

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**DEFENDANTS’ REPLY TO STATE OF OKLAHOMA’S RESPONSE
TO “DEFENDANTS’ JOINT MOTION IN LIMINE TO PRECLUDE PLAINTIFFS
FROM ATTRIBUTING TO DEFENDANTS ANY EVIDENCE RELATED TO THE USE
OF POULTRY LITTER BY CATTLE RANCHERS, FARMERS, AND OTHER
INDEPENDENT THIRD PARTIES” (DKT. NO. 2407)**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George’s, Inc., George’s Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc. (“Defendants”), in reply to the State of Oklahoma’s Response (“Response”) (Dkt. No. 2498) to Defendants’ Joint Motion in Limine to Preclude Plaintiffs From Attributing to Defendants any Evidence Related to the Use of Poultry Litter by Cattle Ranchers, Farmers, and Other Independent Third Parties (Dkt. No. 2407) and in support thereof, Defendants state as follows:

I. INTRODUCTION

In an effort to escape a ruling on Defendants’ Motion and the potential implications thereof, Plaintiffs, in their Response, attempt to redefine their case. The foundation for their lawsuit is their claim that each Defendant is responsible for the over-application of poultry litter

in the Illinois River Watershed ("IRW") by its respective independent contract growers. Second Amended Complaint, ¶¶ 47-63 (Dkt. No. 1215). Plaintiffs' Response not only seeks to expand their theory of the case but also attempts to expand the very reach of the law by contending that Defendants' liability is triggered simply by the creation of poultry litter, rather than by any specific applications of poultry litter to land in the IRW. Response at 1-2. Plaintiffs contend that "[f]or purposes of Defendants' liability for ... pollution, it matters not whether it is a Defendant itself that has land-applied the poultry waste, a contract grower who has land-applied the poultry waste, or a third person who has land-applied the poultry waste." *Id.*

In other words, Plaintiffs now assert that they need only show that a grower raised poultry for a Defendant in the IRW, period. Once this fact is established, according to Plaintiffs, *all* results from *any* application of litter in the watershed – whether by a contract grower or an independent third party unknown to a Defendant – are allegedly attributable to all Defendants. *Id.* This theory greatly oversimplifies Plaintiffs' burden and would hold the Defendants responsible for the actions of third parties with whom they have no association and over whom they have no control. Plaintiffs offer no basis for this unprecedented expansion of vicarious liability and the boundaries of proximate cause. The Court should exclude evidence offered to support this theory under Federal Rules of Evidence 402 and 403.

II. ARGUMENT

Plaintiffs' Response misstates federal and common law and broadly applies principles not adopted in Oklahoma tort law to the facts of this case in an effort to support their wide sweeping argument for attributing responsibility for independent third-party use of poultry litter to

Defendants.¹ Plaintiffs' arguments cannot serve as a basis for expanding any liability the Defendants may have for their contract growers – which Defendants deny – to cover the use of poultry litter by cattle ranchers, farmers, and other independent third parties.

As a threshold matter, such claims go far beyond anything Plaintiffs have pled in their Complaint or the parties have investigated in discovery. Plaintiffs' Complaint makes no mention whatsoever of the use of litter or other actions by third parties; on the contrary, the pleading repeatedly bases its claims on “their [Defendants'] poultry waste disposal practices.” See Dkt. No. 1215 at ¶¶ 98-99, 109-112, 120, 134. These claims simply are not part of this case.

Moreover, even if Plaintiffs had pled such claims, their current response seeks to expand the scope of RESTATEMENT OF TORTS (SECOND) § 427B to cover what Plaintiffs term “428B-*type* liability.” (Response at 2, 3, 4, 5, 6.) It is highly questionable whether section 427B applies even to the relationship between Defendants and the independent growers, with whom Defendants share contractual bonds (as discussed at the August 18, 2009 hearing on the State's motion for partial summary judgment against Defendants).

Plaintiffs nevertheless now look to extend those principles even further, to pull within the ambit of liability individuals and businesses with whom Defendants have no relationship

¹ Most of the arguments raised in Plaintiffs' Response have been the subject of substantial briefing already on record. See Dkt. #2057, *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8 of the Second Amended Complaint and Integrated Brief in Support*, 15-21; Dkt. #2050, *Defendants' Motion for Summary Judgment on Plaintiffs' RCRA Claim (Count 3) and Integrated Brief in Support*, 19-21; Dkt. #2237, *Defendants' Reply in Support of Motion for Summary Judgment on Plaintiffs' RCRA Claim*, 6-9; Dkt. #2184, *Defendant Tyson Poultry, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment with Regard to Plaintiffs' Claims under CERCLA and RCRA*, 11-13; Dkt. #2185, *Defendant Cobb-Vantress, Inc.'s Opposition to Plaintiffs' motion for Partial Summary Judgment with regard to Plaintiffs' State Law and Federal Common Law Claims*, 2-10. Rather than reargue the principle issues of agency, contribution, and control here, Defendants incorporate these arguments by reference. This reply focuses instead on Plaintiffs' attempt to expand these legal theories even further to cover independent third parties with no direct relationship whatsoever to Defendants.

whatsoever. For instance, without citing to any case support, Plaintiffs make the blanket assertion:

[W]here Defendants' contract growers have transferred poultry waste from their contract growing operations to third persons, these transfers are viewed, as a matter of law, as transfers by Defendants. Under RESTATEMENT OF TORTS (Second) § 427B-type principles, Defendants are therefore liable for the environmental impacts of such poultry waste.

Response at 4, n.4 (emphasis added). Argued slightly differently: “Defendants have known or should have known that ... the land application of this poultry waste is likely to ... create a nuisance and trespass in the IRW[, which] ... is a foreseeable consequence of Defendants’ arrangement with their respective contract growers. That certain contract growers might from time to time transfer the poultry waste generated by Defendants’ birds to a third party for land application in no way changes the analysis.” *Id.* at 4.

Plaintiffs provide no support for their novel view of “§ 427B-type liability,” nor could they. The question of what a defendant should have known when is necessarily rooted in proximate cause principles. *See, e.g., Lamb v. JB Hunt Transp. Servs.*, 2009 U.S. App. LEXIS 11973, at *15 (10th Cir. Okla. June 1, 2009) (unpublished) (*citing, e.g., Moran v. City of Del City*, 77 P.3d 588, 592-93 & n.5 (Okla. 2003), and *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 346 (N.Y. 1928)). Here, Plaintiffs would have this Court employ a standard of proximate causation that would turn *Palsgraff* and basic tort law on its head by sweeping in effects caused by the actions of persons and businesses who have no legal connection to Defendants. The Court should decline the invitation to so expand the law.

Aside from misapprehending basic tort concepts, Plaintiffs’ third party § 427B arguments also fail on their face. When independent non-poultry growing farmers, ranchers, or other businesses purchase litter for their own fertilizer use, they act at their own discretion without any

authority as an agent or an independent contractor of either the Defendants or independent poultry growers. These facts preclude the application of § 427B, which states that:

One who *employs* an *independent contractor* to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

(emphasis added). The provision simply does not apply to third parties whom the Defendants do *not* employ and who simply make purchases from independent contractors.

Plaintiffs quote a 1983 Pennsylvania District Court decision applying § 427B for the principle that “an employer or contractor is held liable for ‘farming out’ work which he knows, or has reason to know, will create a nuisance.” Response at 4. Plaintiffs’ Response, however, ignores an important aspect of the *McQuilken* analysis. The Pennsylvania court quoted the official comments to § 427B, which state, “It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result.” Contrary to Plaintiffs’ assertions, neither the Defendants nor independent contract growers are “farming out work” for independent third parties to perform in the usual or prescribed manner. Defendants have no employee/employer or independent contractor relationship with these third parties, are not involved with the transfer of poultry litter to the third parties, and have no enforcement abilities or oversight with respect to the third parties. These third parties purchase or barter for the litter from contract growers upon their own initiative for their own personal use; they do not even arguably operate as agents or independent contractors of the contract growers. Defendants are not aware which contract growers sell or trade their litter, what quantities are sold or given, to whom, the intentions of any given individual buyer, or on what land that third party ultimately applies litter.

These third party purchasers do not perform work for Defendants or even the independent contract growers; therefore, there can be no evidence that the third parties act in the usual or prescribed manner in performing work “farmed out” by Defendants. They perform “work,” *i.e.*, land application of poultry litter, on their own behalf and for their own benefit. Plaintiffs have not asserted or adduced a modicum of evidence to suggest otherwise. The principle set forth in § 427B is simply inapplicable where, as here, a consumer purchases a product for his personal use and application. The facts of this case do not fit the scenario envisioned by the drafters of RESTATEMENT § 427B.

Plaintiffs further mischaracterize the relationship between Defendants, independent contract growers, and third party purchasers of litter in an attempt to meet Plaintiffs’ expansive view of vicarious liability when discussing 27A Okla. Stat. § 2-6-105(A), 2 Okla. Stat. § 2-18.1, and RCRA contributor liability. According to Plaintiffs, the test under the Oklahoma statutes at issue is whether Defendants “caused” or “caused to be placed” the litter applied by the third parties. Response at 5. Similarly, with respect to RCRA, Plaintiffs assert that the determinative factor is whether Defendants had “a part or share in producing the effect.” *Id.* Plaintiffs argue that these statutory provisions incorporate liability for land application by third parties. Previous briefing before the Court, which has been incorporated herein, lays out Defendants’ views on these incorrect and misleading interpretations of the relevant law. *See supra* n. 1.

Plaintiffs’ newly redefined theory of this case would effectively turn the creation of litter alone, regardless of whether there is any over-application (however that is defined), into a statutory violation, and would hold Defendants responsible regardless of who actually owns or applies the litter, and regardless of Defendants’ lack of contractual or other relationship with

these third parties. This interpretation ignores the actual facts in this case and stretches the law of proximate cause and vicarious liability beyond its limits.

When non-poultry growing farmers and ranchers purchase litter, they make their own decisions about where the litter is placed or “cause[d] to be placed.” Plaintiffs’ discovery responses have identified no evidence to the contrary. Defendants have no input or control over the handling, treatment, transportation, or “disposal” of litter while it is in the possession of independent contract growers or after it is sold to a third party and cannot be said to have had “a part or share in producing the effect” of the over-application of such litter. Holding Defendants liable for these applications would be analogous to holding a producer of commercial fertilizer liable under RCRA or the Oklahoma statutes if a commercial purchaser improperly disposed of the product. This, as noted in Defendants’ reply in support of their Motion for Summary Judgment on Plaintiffs’ RCRA Claim, would be the unavoidable result of Plaintiffs’ oversimplification of RCRA contribution liability. *See* Dkt. No. 2237 at 6-9. By introducing the commercial fertilizer into the stream of commerce, any manufacturer would have “caused” or “caused to be placed” the fertilizer on fields and thus had “a part or share in producing the effect,” despite having no control over the ultimate use of the product. *See id.*

The State can offer no legal or evidentiary basis for stretching Defendants’ liability under RESTATEMENT OF TORTS (Second) § 427B, RCRA, or the Oklahoma statutory provisions contained in 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18.1 to land applications of litter by non-grower third parties. As such, any evidence regarding land applications of poultry litter by non-grower third parties is irrelevant and any attempt to attribute these applications to Defendants would be highly prejudicial.

WHEREFORE, Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc.,

Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc., respectfully ask this Court to grant Defendants' Joint Motion in Limine to Preclude Plaintiffs From Attributing to Poultry Defendants any Evidence Related to the Use of Poultry Litter by Cattle Ranchers, Farmers, and Other Independent Third Parties.

Respectfully submitted,

BY: /s/ Michael R. Bond
Michael R. Bond, *appearing pro hac vice*
Erin Thompson, *appearing pro hac vice*
Dustin R. Darst, *appearing pro hac vice*
KUTAK ROCK LLP
234 East Millsap Road, Suite 400
Fayetteville, Arkansas 72703-4099
(479) 973-4200 Telephone
(479) 973-0007 Facsimile
-and-

Robert W. George, OBA #18562
Bryan Burns, *appearing pro hac vice*
TYSON FOODS, INC.
2210 West Oaklawn Drive
Springdale, Arkansas 72762
(479) 290-4067 Telephone
(479) 290-7967 Facsimile
-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 North Robinson, Suite 900
Oklahoma City, Oklahoma 73102
(405) 239-6040 Telephone
(405) 239-6766 Facsimile
-and-

Jay T. Jorgensen, *appearing pro hac vice*
Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Gordon Todd, *appearing pro hac vice*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 Telephone
(202) 736-8711 Facsimile

Attorneys for Defendants Tyson Foods,
Inc., Tyson Chicken, Inc., Tyson Poultry,
Inc., and Cobb-Vantress, Inc.

BY: /s/James M. Graves
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
Earl "Buddy" Chadick
Vincent O. Chadick
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, Arkansas 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, Oklahoma 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

Attorneys for George's, Inc. and George's
Farms, Inc.

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
Craig A. Mirkes, OBA #20783
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, Oklahoma 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

Attorneys for Peterson Farms, Inc.

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, Arkansas 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, Oklahoma 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

Attorneys for Simmons Foods, Inc.

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454

William D. Perrine, OBA #11955

Gregory A. Mueggenborg

PERRINE, MCGIVERN, REDEMANN,

REID, BERRY & TAYLOR, P.L.L.C.

Post Office Box 1710

Tulsa, Oklahoma 74101-1710

Telephone: (918) 382-1400

Facsimile: (918) 382-1499

-and-

Robert E. Sanders

Stephen Williams

YOUNG WILLIAMS P.A.

Post Office Box 23059

Jackson, Mississippi 39225-3059

Telephone: (601) 948-6100

Facsimile: (601) 355-6136

Attorneys for Cal-Maine Farms, Inc. and
Cal-Maine Foods, Inc.

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John H. Tucker, OBA #9110

Theresa Noble Hill, OBA #19119

RHODES, HIERONYMUS, JONES, TUCKER &

GABLE, PLLC

100 W. Fifth Street, Suite 400 (74103-4287)

P.O. Box 21100

Tulsa, Oklahoma 74121-1100

Telephone: (918) 582-1173

Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Melissa C. Collins
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

Attorneys for Cargill, Inc. and Cargill
Turkey Production, LLC

CERTIFICATE OF SERVICE

I certify that on the 31st day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
David P. Page
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Robert M. Blakemore
BULLOCK BULLOCK & BLAKEMORE, PLLC

lbullock@bullock-blakemore.com
bblakemore@bullock-blakemore.com

Frederick C. Baker
William H. Narwold
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
Mathew P. Jasinski
MOTLEY RICE, LLC

fbaker@motleyrice.com
bnarwold@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com
mjasinski@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
Craig A. Mirkes
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Robert P. Redemann
David C. Senger
William D. Perrine
Gregory A. Mueggenborg
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
dsenger@pmrlaw.net
wperrine@pmrlaw.net
gmueggenborg@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Earl Lee "Buddy" Chadick
Vince Chadick
BASSETT LAW FIRM

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com
bchadick@bassettlawfirm.com
vchadick@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Kerry R. Lewis
Colin C. Deihl
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com
klewiscourts@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Todd P. Walker
Melissa C. Collins
FAEGRE & BENSON LLP

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
twalker@faegre.com
mcollins@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ Michael R. Bond

Michael R. Bond